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No. 82-895

In the Supreme Court of the United States

October Term, 1982

JAMES MARSHALL,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTION OF LAW

Respondent submits that the question presented by the record in this case is more properly stated as follows:

1. Whether petitioner was denied the effective assistance of counsel as a result of trial counsel's failure to file a motion to suppress the evidence of the pre-trial identification, as well as his failure to object to the in-court identification of Stanley Baker.

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To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio.

The Court of Appeals, Eighth Judicial District, affirmed the convictions. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is presented by the Petition for Certiorari.

HISTORY OF THE CASE

This appeal arises from the denial of petitioner, Jimmie Marshall's, petition to vacate the July 2, 1975 judgment of conviction[1] for two counts of felonious assault, which resulted in his being sentenced to concurrent terms of 2-15 years at the Chillicothe Correctional Institution.[2] A direct appeal to the Court of Appeals resulted in the affirmance of the judgment of the trial court on March 30, 1977.

Petitioner's petition to vacate, initially filed on October 3, 1977, was responded to by the State on October 10, 1977 with a motion to dismiss. However, no action was taken by the trial court on either the petition or the motion.

Petitioner thereafter filed an identical petition to vacate the judgment on November 24, 1980 which was sim-

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1. Judge August Pryatel, although assigned to the panel on appeal, disqualified himself from participating with the panel, having sat as the trial judge in the original proceedings.

2. The record reveals that appellant has been released on bail since November 6, 1976, except for a short period of time from October 9, 1980 through October 17, 1980 when his appeal bond was forfeited.

ilarly responded to by the respondent with a motion to dismiss.[3] A post-conviction hearing was held on January 7, 1981 and on June 10, 1981 the trial court denied the petition to vacate. The Court of Appeals, Eighth District, affirmed. The Ohio Supreme Court declined jurisdiction finding no substantial constitutional question existed for review. It is from this final judgment that petitioner appeals.

STATEMENT OF FACTS

The evidence adduced at the original trial was set forth by this Court as follows on petitioner's direct appeal from this judgment of conviction:[4]

> "The first witness for the State of Ohio was Stanley Baker. Mr. Baker testified that on February 14, 1975, at approximately 7:30 in the evening, he and his brother, Michael, were driving south on Interstate-77, when a car drove up behind them, flashing its lights (Tr. 7). As the car came alongside, the driver motioned for Baker to roll down his window. After the window was rolled down, the driver of the approaching car reached into his glove compartment, brought out a gun, and started shooting (Tr. 8). Baker told his brother to duck, and they then followed the other car up the exit ramp at East 49th Street and Fleet. The other car stopped at a traffic light, and when the light turned green, the Bakers passed the car, and the driver shot at them again (Tr. 8). Baker described the car and the gun, and identified the appel-

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3. This second petition to vacate was precipitated by petitioner's arrest in October, 1980 when his bond was forfeited.

4. *State v. Jimmie Marshall* (Eighth App. Dist., March 10, 1977) (Unreported Case No. 35702)

lant in court as the man who had fired at him (Tr. 9-10). The appellant, Marshall, allegedly fired three shots while on I-77, and two more after exiting I-77 (Tr. 11).

"Baker testified that another adult and a child were in the front seat of Marshall's car, and that two adults and a child were in the rear (Tr. 12). The Bakers went directly to the Newburgh Heights Police Station, and reported the incident, giving the police the license number of the car in question (Tr. 13). At the police station, Baker noticed a bullet hole in the right front fender of his car, a piece of the chrome missing from the right rocker panel, and a bullet hole above the right rear window (Tr. 14). The next day, while Baker was working on his car, he reexamined the bullet hole in the fender, and found the bullet near the fender well. The spent bullet was offered into evidence by the State (Tr. 18). Photographs of Baker's car, taken by the police on February 16, and a statement made by Baker on that date were also offered into evidence (Tr. 14-16, 34-35).

* * * * *

"Michael Baker was the next witness to testify. He told basically the same story as his brother (Tr. 50-62), and added that while at the Newburgh Heights Police Station, he had observed the appellant's car approximately 150 feet away at a stop light, under a street light (Tr. 57-58). Michael also stated that the police called him and his brother to view a lineup, and that upon arriving at the Central Police Station, they saw the appellant sitting on a bench, and immediately identified him to the police (Tr. 79-80).

"The State called two police officers involved in the case to testify. One of the officers read into the

record a statement made by the appellant in which he gave his version of the incident on February 14. He stated:

> 'I went to pass this car, I blinked my lights to go around him, then he hit his brakes. So I went to the right. Then he came back over on me he was straddling the white line. [sic]. Then I got around him and I came off the ramp at Fleet Ave., and then he was waiting for me to go off the ramp at Fleet Ave. and he backed up and followed me.
>
> 'Then when the light changed he shot around me and that is the last that I seen him.' (Tr. 114).

"At the conclusion of the State's case, the defense moved for a judgment of acquittal, pursuant to Crim. R. 29 (Tr. 142-143). The motion was overruled, and the defense proceeded to put on its witnesses (Tr. 144). The record does not reflect that the motion for acquittal was renewed at the end of the defense's case.

"The two women who were allegedly in the car with the appellant testified for the defense. They both denied that the shooting had taken place, and did not recall that anything unusual had happened (Tr. 160, 189). The defense also put on a character witness and a bookkeeper for the Bellaire Medical Clinic. The bookkeeper testified on cross-examination that the appellant had a 'sutured laceration left index finger' which was cleaned and dressed on November 13, 1974 (Tr. 181).

"The defendant testified in his own behalf. He admitted that he had experienced an encounter with the Bakers' car on I-77 on the night in question (Tr.

210). He stated that when he first noticed the Bakers' car, it was in the passing lane in front of him. He came up behind Baker in the passing lane and blinked his lights to pass him. Baker then 'hit his brakes' and when the appellant pulled to the right Baker moved to the right. When Baker pulled back to the left, the appellant signalled to exit at Fleet Avenue, and Baker, who had been ahead of Marshall, backed up, and exited at Fleet behind him. Marshall learned who the occupants of the car were on February 16, when the detectives came out to his home (Tr. 210-211).

"The defense rested at the end of the appellant's testimony and the guilty verdicts were returned on July 2, 1975."

REASONS FOR DENYING THE WRIT

1. Whether petitioner was denied the effective assistance of counsel as a result of trial counsel's failure to file a motion to suppress the evidence of the pre-trial identification, as well as his failure to object to the in-court identification of Stanley Baker.

Petitioner is presently before this Court to appeal the denial by the trial court of his petition to vacate the judgment, originally filed October 3, 1977 and subsequently filed November 24, 1980.

Petitioner argues that he was denied effective assistance of counsel as a result of trial counsel's failure to file a motion to suppress the evidence of the pre-trial identification, as well as his failure to object to the in-court identification of Stanley Baker.

Ohio courts have set forth the following synopsis of guidelines to consider when counsel's effectiveness is challenged:

> "In *State v. Hester* (1976), 45 Ohio St. 2d 71, 79, the Ohio Supreme Court set out the test for effective assistance of counsel as follows:
>
> > 'Balancing the rights of the accused and the public, we hold the test to be whether the accused under all the circumstances had a fair trial and substantial justice was done.'
>
> "The Supreme Court later elaborated on the test to be employed in *State v. Lytle* (1976), 48 Ohio St. 2d 391:
>
> > 'First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *Id.* at 396.
>
> "In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St. 2d 299. Therefore, the burden of proving ineffectiveness is on the defendant and it is a heavy one. *State v. Smith* (Cuy. Cty. Ct. App., Dec. 17, 1981), Case No. 43499, ... Ohio App. 2d....."
>
> *State v. Perry* (Cuy. Cty. Ct. App., March 11, 1982), Unreported Cases Nos. 43713, 43714.

It is unlikely that the trial court would have granted the motion to suppress the pre-trial identification. Petitioner will be unsuccessful in meeting this burden.

The basic issue raised on appeal is whether the pre-trial identification of petitioner by the victim/witness Stanley Baker at the police station so tainted the witness's subsequent in-court identification as to render it inadmissible.

The United States Supreme Court in *Simmons v. United States* (1968), 390 U.S. 377, 384, in determining whether or not to set aside a pre-trial identification by photographs, enunciated the following two-step inquiry to assist in the determination of whether to allow an in-court identification: (1) whether the pre-trial identification was itself ". . . so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," and if so, (2) whether there is nevertheless an independent source for the in-court identification. *See United States v. Gambrill* (1971), 449 F.2d 1148, 1153.

In determining whether the in-court identification was the product of an improper pre-trial identification or was rather based upon the witness's independent recollection and observation of the accused, the Ohio Supreme Court has instructed that we consider "the totality of the circumstances" surrounding the identification. *See State v. Lathan* (1972), 30 Ohio St. 2d 92; *State v. Jackson* (1971), 26 Ohio St. 2d 74.

In the instant case, the pre-trial identification was not "impermissibly suggestive". The transcripts of both the trial and post-conviction hearing revealed the following facts surrounding the pre-trial identification.[5]

Immediately following the highway incident the Bakers proceeded directly to the Newburgh Heights Police Sta-

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5. All references to the transcripts will be as follows: Trial = Tr.; Post-conviction = P.C.

tion where they not only gave the police the license number and description of the automobile which the suspect had driven, but Stanley Baker also provided the following description of the accused:

> ". . . a dark-skinned colored male approximately 40 years old, heavy set." (Tr. 89).

After tracing the license tag to petitioner, the police proceeded to petitioner's home on February 16, 1975 and asked that he accompany them to the police station for questioning regarding the highway incident. At the post-conviction hearing, petitioner testified that he was informed that his accusers would be called to come to the station to identify him, at which time he agreed to participate in a lineup, a confrontation or a showup (P.C. 23). Petitioner was asked to be seated on a bench outside of the detective's office with two other black males in street clothes in their late thirties, until his accusers arrived (P.C. 28). Petitioner described one man as being fair-skinned and the other one as being older, bald and having a moustache (P.C. 35, 36).

At trial, Detective Bellito of the Cleveland Police Department testified that the men seated on the bench were victims of a crime (Tr. 108) who were waiting to speak with detectives, and suggested that petitioner sit and mingle with these men on the bench. The detective described the men on the bench as having the same build and being the same age as petitioner (Tr. 109).

Upon arriving at the police station, Stanley Baker and his brother walked past petitioner into the detective's office (Tr. 109) and identified petitioner to the detective (Tr. 44). The detective then came out and informed petitioner that he'd been identified (P.C. 22). Detective Bellito testified that after Stanley Baker pointed out petitioner on

the bench, he proceeded to accuse him of being the one who had shot at him. Petitioner denied this accusation, stating, "You cut me off." (Tr. 109).

Based on the foregoing evidence, it is the State's conclusion that the pre-trial identification procedures employed in this case were not "impermissibly suggestive." Therefore a motion to suppress the pre-trial identification would not have been granted and, therefore, failure to file such a motion did not deprive petitioner his effective assistance of counsel.

As to whether the in-court identification of petitioner was based on Stanley Baker's independent recollection and observation of petitioner at the scene of the altercation, we have considered the factors set forth in *Neil v. Biggers* (1972), 409 U.S. 188, 199:

> "* * * the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

Stanley Baker testified at trial that the lighting conditions on Interstate-77 were fairly bright, enabling him to get a good look at the accused while their cars travelled side by side down the highway at a speed of 40 m.p.h. for approximately one minute (Tr. 26). On cross-examination he stated:

> "On 77 I got one look at the man. When you are five feet away from somebody that's pointing a gun at you, you take a pretty good look."

Petitioner himself testified that the problem with the Bakers took place over a mile's length for about five to ten minutes (Tr. 235).

Stanley Baker testified further that he observed the accused again at the light at 49th Street and Harvard Avenue, after exiting the highway. It was after this testimony that he proceeded to make his in-court identification of appellant (Tr. 9-10). Michael Baker also testified that he had observed appellant's car approximately 150 feet away at a stop light, under a street light (Tr. 57-58).

Under the facts and circumstances of this case anyone would conclude that Stanley Baker's in-court identification of petitioner was based upon his independent recollection of his observation of the appellant on the lighted highway. Stanley Baker provided the police with a description of appellant immediately after the incident. In addition, only two days had elapsed from the time of the incident to the time of the pre-trial identification. Stanley Baker demonstrated a high level of certainty at both the pre-trial and in-court identification.

Finally, in considering the "totality of the circumstances" surrounding the identification, we discount the possibility of mistaken identity as we note that petitioner was apprehended by the police at his home based upon a trace of the license number of his car provided to the police by Stanley Baker, thus placing him at the scene of the crime. Furthermore, we also note Detective Bellito's testimony that after informing petitioner at his house of the nature of the complaint which had been filed, petitioner admitted that he'd been travelling on Interstate-77 and did, in fact, have "a little argument with some motorist in travel" (Tr. 106).

Contrary to petitioner's arguments we fail to find that the pre-trial identification was "impermissibly suggestive," nor is there fault with the subsequent in-court identification. Based on these facts, the petitioner was not denied the effective assistance of counsel.

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by the court. The petition for a writ of certiorari must be denied.

Respectfully submitted,

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